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IN THE

Supreme Court of the United States

October Term, 1964

No. 8

UNITED STATES OF AMERICA,
Plaintiff,

v.

HUCK MANUFACTURING COMPANY AND
TOWNSEND COMPANY,
Defendants

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

MOTION TO AFFIRM

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No. 538

UNITED STATES OF AMERICA,
Plaintiff,

v.

HUCK MANUFACTURING COMPANY AND TOWNSEND COMPANY,
Defendants

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Appellees, Huck Manufacturing Company and Townsend Company, pursuant to Rule 16 of the Revised Rules of this Court, move that the judgment of the district court be affirmed on the ground that the questions on which the decision of this cause depends are not substantial or of public importance and need no further briefing or oral argument.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing the Government's civil antitrust suit against Huck Manufacturing Company ("Huck") and Townsend Company ("Townsend").[1]

The Government's complaint was dismissed by the district court because of failure of proof that the appellees "have or are engaged in a combination and conspiracy in unreasonable restraint of trade and to monopolize interstate trade and commerce in lockbolts in violation of Sections 1 and 2 of the Sherman Act * * *". The district court concluded that upon the evidence "the case at bar is in all material respects the same as and ruled by the decision in *U. S. v. General Electric Co.*, 272 U. S. 476, 489 * * *" and that the Government "failed to show that the patent arrangements between Huck and Townsend were designed to or did secure a reward beyond that to which Huck as the patent owner was legally entitled". (Conclusions VII, VIII and IX, J. S. 24a, 25a, 29a and 30a).

The appellant in its statement of the case has failed to deal with the nature and effect of the district court's supplement to the record entered on August 19, 1964, which amended a pretrial order and was made for the purpose of showing the position taken by the Government at a pretrial hearing. (J. S. 32a-38a.) Appellant has treated the subject of the district court's order of August 19, 1964 as so unimportant as to warrant mention only in a footnote (J. S. 10-11, Footnote 10), while the district court considered the matter of such importance to its treatment of the case as to warrant clarification by a separate order and memorandum. (J. S. 32a-38a). The district court specifi-

[1] The Government commenced the civil action involved herein, together with a companion criminal suit on October 24, 1961.

cally found that the Government at a pretrial hearing had taken the position that it was not attempting to have the doctrine set in the *General Electric* case overruled and that the doctrine "is still good law". (J. S. 38a.)

The district court rendered an opinion incorporating careful and detailed findings of fact and conclusions of law. The appellant has not directly challenged the district court's findings of fact, but in its statement of the case in the Jurisdictional Statement describes the case in a way which differs in several important respects from the findings of fact of the district court. Appellees believe it is important for this Court to understand in what ways the appellant is stating the evidence contrary to the findings of fact.

In its statement of the case the appellant has overstated the findings of the district court in an earlier companion criminal proceeding. The finding of the district court in the criminal case was that the facts did not constitute violations of Section 1 of the Sherman Act without evidence that the advantage acquired by the defendants was more than a normal and reasonable reward to a patentee. However, appellant overstates the court's finding in discussing the so-called "oral agreement". (J. S. 4.) The district court in the companion criminal case did not refer to any agreement but talked only in terms of a "continuing arrangement".[2]

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[2] The applicable part of the district court's opinion in the criminal case is found at 214 F. Supp. 776, 777 and reads as follows:

"Simplifying, or perhaps over-simplifying, the Government has established the following, at least *prima facie*: Huck owns patents and has entered into a continuing arrangement with Townsend under which the patented product, a metal fastening device, is manufactured and sold at prices determined by Huck, no other firm is permitted to engage in the manufacture and sale of the product, and each firm is entitled to exploit improvements and related products developed by the other."

Appellees most serious quarrel with appellant's statement of the case is that without ever challenging the findings of fact of the district court, it largely ignores those findings while quoting at length from conflicting or contrary testimony and documentary exhibits introduced below by appellant. The appellant's statement of questions presented clearly indicates that appellant takes the position that the judgment is incorrect as a matter of law, without the need to challenge the findings of fact. Appellant then proceeds to state as facts many of the inferences which it sought to establish below and which were rejected by the district court.

As an example, in discussing Townsend's request for a lockbolt license from Huck, appellant makes a statement as to Townsend's state of mind or intention in requesting a lockbolt license from Huck shortly after the latter part of 1950. (J. S. 6.) This state of mind or intention was never discussed by the district court in its finding of fact No. 12 relating to that period of time. (J. S. 10a-11a.) The Government also goes on to refer to the state of mind or intention of Huck in considering granting a lockbolt license to Townsend in 1953 and to Townsend's state of mind or intentions in seeking such a license. (J. S. 6-7.) In connection therewith appellant has not only stated matters not part of findings No. 12 and 13 but has failed to mention the specific finding No. 13 that Huck was motivated by the demand of its customers for a second source of supply and delay in meeting delivery dates specified by its customers and that Townsend was motivated by a desire to obtain an exclusive license.

As noted in the appellant's statement, the appellees do not agree that after the first two years the license in question was conditioned on the licensee, Townsend, maintaining prices fixed by Huck, the licensor, and both cases (criminal and civil) were concluded without the necessity of ap-

ellees putting in any testimony. However, a Government itness testified that there was an oral agreement to ex- nd the two-year period during which the written license greement between appellees was to be exclusive and pro- de for first sale price maintenance. (Findings 15-16, J. S. 3a-15a). There was no finding that the alleged oral agree- ent was established by the evidence or that Huck actually ictated the prices charged by Townsend, but the dismissal f the complaint is apparently based on the assumption that here would have been no violation even if the alleged oral greement had been established. Accordingly, for purposes f this appeal existence of the oral agreement will be as- umed.

Appellees' position is that the judgment of the district ourt is clearly correct, that it is fully supported by the vidence of record and decisions of this Court, and that no ubstantial question based upon the record or substantial uestion of public importance is presented by the appeal.

SUMMARY OF ARGUMENT

I. With Respect to The Government's Urging That This Court Should Reconsider and Overrule United States v. General Electric Company, 272 U.S. 476 (1926)

With respect to the first question presented in the Government's Jurisdictional Statement, appellees' argument more fully shows the following:

This is Not a Proper Case to Reconsider And Determine Whether or Not General Electric Should Be Overruled Because the Government Expressly Disclaimed and Waived That Issue in the Court Below

(1) In the district court, on pre-trial, the Government expressly disclaimed and therefore waived the issue whether *General Electric* should be overruled. It joined issue with appellees on whether this case fell within or outside the facts and law of *General Electric*. Appendix C to the Government's Jurisdictional Statement, at page 38a, contains an irrefutable record statement by the Government that "it is not attempting to have the doctrine in the General Elecric case overruled" and that "the doctrine is still good law".

(2) By seeking to raise for the first time in this appeal the question whether *General Electric* should be overruled, the Government has completely changed the theory of its case as argued and briefed below. This is contrary to the fundamental principle generally applied by this Court that it will not consider questions which were not raised below. This principle is especially applicable when, as here, the appellant departs from the joinder of issues on which it de-

liberately chose to base its case in the district court from which this appeal is taken directly to this Court under the Expediting Act.

Such a shift in the theory of the Government's case is clearly prejudicial to the appellees. This surprise tactic on appeal violates the rudimentary principles of fair play and the orderly process of adjudication in Anglo-American jurisprudence. It is obvious that preparation for trial and the trial of any case are inherently governed by the joinder of issues.

It is untenable for the Government to assert that appellees were not prejudiced because they still have occasion to present defenses, since the court below granted the appellees' motion to dismiss at the close of the Government's case-in-chief. Appellees consented to a stipulation that the Government could offer in this civil suit the record in the prior criminal proceeding only after the Government expressly disclaimed an intention to seek the overruling of *General Electric*.[3] Beyond that, it is elementary that the substantive, procedural and evidentiary approach to *any* case, including the nature of the cross-examination of witnesses, is governed by the joinder of issues at the trial level. The whole purpose of the pre-trial, designed to identify the issues, is negated if an appellant can change its basic theory for the first time on appeal after losing its case on another theory it elected in the trial court.

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[3] The pretrial hearing at which the waiver was made was held on October 15, 1962 (J. S. pp. 33a-38a) and the stipulation was signed by counsel for the parties on several dates in March and April, 1963. The stipulation is reproduced *infra*, p. 39.

II. The General Electric Decision Should Not Be Overruled, Even Apart from the Government's Waiver of That Issue Below

Apart from the Government's express disclaimer, it would be inappropriate on the record of this case to reconsider and overrule *General Electric*.

(1) *General Electric's ratio decidendi*, formulated in 1926 by a unanimous Court, is a sound and proper accommodation of the patent laws and antitrust laws when construed *in pari materia*, as the majority of this Court stated and approved in its recent majority opinion in *Simpson v. Union Oil Company*, 377 U. S. 13 (1964).

(2) Businessmen and their counselors have justifiably relied upon the rule of *General Electric*. This is not a proper case to depart from the rule of *stare decisis* deeply imbedded in American jurisprudence. Only in exceptional circumstances has this Court overruled a long-standing precedent; and none of the grounds upon which this Court has overruled its prior decisions exists in this case. The Government has failed to show that changing conditions, the lessons of experience or inconsistent later decisions of this Court require reconsideration and overruling of *General Electric*.

(3) Whether regarded as a principle judicially created by a unanimous Court in the 1926 *General Electric* case, or as a matter primarily of Congressional concern, it is noteworthy that Congress has not responded to numerous bills introduced in the 1940's to outlaw the first sale price limitation in a patent license as sanctioned by *General Electric*, as well as other limitations, such as the field of use limitation, also sanctioned by this Court in *General Talking Pictures v. Western Electric Co.*, 305 U. S. 124 (1938).

More significantly, when the Congress in 1952 codified the patent laws, with revisions of certain prior provisions and addition of new provisions, it did not seek to disturb the *General Electric ratio decidendi.*

III. With Respect to the Government's Alternative Ground That the Huck-Townsend License Arrangement Goes Beyond General Electric and Violates the Sherman Act

The District Court Correctly Held That The Huck-Townsend Patent Arrangement Is In All Material Respects Within The Sanction of General Electric

On the second question presented by the Government, the district court correctly held that the Huck-Townsend exclusive patent license here in issue is in all material respects within the sanction of *General Electric.*

The findings of fact of the district court, not directly challenged by the Government, are to the effect that the alleged oral agreement involves nothing more than an extension of the term of the exclusive license to Townsend so long as Townsend continued to observe Huck's prices. (Finding 16, J. S. 15a.) As shown more fully in appellees' argument, the Government is attempting to challenge the legality of the grant of an exclusive license.

The Government Misconceives The Inherent Nature Of An Exclusive License

This Court and lower federal courts have never questioned the right of the patentee to grant an exclusive license —in this case exclusive of all others than the patentee itself—so long as the patentee acts individually in the exercise of his independent and untrammelled judgment.

The oral agreement to which the court below refers in its Finding 16 is in legal effect only an extension of the original two-year exclusive license to Townsend. From this exclusive license stems the lawful consequence that, so long as the exclusive license remains in effect, the patentee must individually refrain from licensing others. No antitrust violation has ever been held by this Court or a lower federal court to arise from an exclusive license *per se*. *General Electric at the very least* sanctions a first sale price limitation in a *single license*. In this case, the question whether a plurality of non-exclusive licenses, each containing a first sale price limitation, is also within the sanction of *General Electric*, is not in issue. The only price limitation in this case is in the exclusive license by Huck to Townsend.

ARGUMENT

I.

THIS IS NOT A PROPER CASE IN WHICH TO RECONSIDER AND DETERMINE WHETHER OR NOT GENERAL ELECTRIC SHOULD BE OVERRULED BECAUSE THE GOVERNMENT EXPRESSLY DISCLAIMED AND WAIVED THAT ISSUE IN THE COURT BELOW

The Government's Jurisdictional Statement anticipates this contention of the appellees but seeks to avoid the frequently repeated general principle of this Court that it will not consider on appeal questions not raised by appellant below.

Appellees note first that the Government does not challenge the supplement to the record which the district judge made with his comment that:

> "The interests of justice will best be served if a full and complete record of all proceedings in the

trial court is available to the appellate court upon its review of the case". (J. S. 37a.)

The Government Affirmatively Disclaimed Attack Upon General Electric, Which it Asserted Was "Still Good Law"

The essence of this supplemental amendment to one of the pretrial orders, set forth in footnote 10 of the Government's Jurisdictional Statement, and at page 39a of its Appendix C, consists of two unequivocal representations on behalf of the Government in the court below. One is that the Government "is not attempting to have the doctrine set in the *General Electric* case overruled and stated only that facts in this case do not fall within that doctrine". (J. S. 38a.) The other is the immediately following assertion by Government counsel "that the [General Electric] doctrine is *still good law* but does not apply as the actions in this case are illegal without application of the doctrine * * *" (emphasis supplied). (J. S. 38a.)

These categorical representations were later supplemented by a letter from the then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (J. S. 39a-40a) in which he dealt solely with the Government's theory that "the facts of this case fall outside the facts and law of *United States v. General Electric* * * *". (J. S. 41a.)

It is difficult to imagine how statements as unambiguous as those above quoted can be construed otherwise than as an express disclaimer and waiver of the Government's intention to make the overruling of *General Electric* an issue in this case.

Faced with these irrefutable statements of record, the Government's Jurisdictional Statement, by way of con-

fession and avoidance, seeks to persuade this Court that the foredoing addition to the pre-trial order "ought not preclude the plenary consideration by this Court of the important question whether *General Electric* should be overruled". Appellees recognize that there is no jurisdictional restriction upon the Court's consideration of new questions, either *sua sponte* or otherwise, in exceptional circumstances. Appellees submit, however, that, in the circumstances of this case, there are no compelling considerations for injecting for the first time on appeal an issue deliberately disclaimed and waived by the Government below.

First, this Court in promulgating the Federal Rules of Civil Procedure intentionally provided several means by which the issues to be tried could be defined and limited in the interests of an orderly trial and disposition of the controversy. Among the procedures provided for this purpose is the pretrial hearing and the pretrial order for the pupose of defining and limiting the issues for trial. Rule 16 specifies that "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Thus, the rule in limiting the issues to be tried limits the evidence which may be offered.

The spirit and intent of this portion of Rule 16 has been consistently followed by the lower courts, even in cases involving the United States.[4] Accordingly, the question

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[4] *Washington v. General Motors Acceptance Corp.*, 23 F.R. Serv. 16.32 Case 2 (S.D. Fla. 1956);
Montgomery Ward & Co., v. The Northern Pacific Terminal Company of Oregon, 17 F.R.D. 52 (D. Ore. 1954);
Sinclair Refining Company v. George L. Howell, 222 F. 2d 637 (5th Cir. 1955);
United States v. An Article of Drug, etc., Acnotabs, 207 F. Supp. 758 (D. N.J. 1962);
Frank v. Giesy, 117 F. 2d 122 (9th Cir. 1941);

(Continued on next page)

whether or not the *General Electric* doctrine is good law was not an issue in this case; was not tried or argued below; and is not properly before this Court.

Even where the issues have not been expressly limited by pleadings or otherwise, this Court has generally refused to pass on matters not raised or considered below.

In *Duignan v. United States,* 274 U. S. 195 at 200 (1927), the Court stated:

> "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed".

See also *Wong Tai v. United States,* 273 U. S. 77 at 78 (1927) (constitutionality of statute raised for the first time on appeal not considered); and *Helvering v. Cement Investors, Inc.,* 316 U. S. 527 at 535 (1942), where the Court said: "We will not consider here for the first time the question whether a tax liability may have been incurred under Section 112 (a) by reason of the earlier transaction, a question not fairly within the issues as framed by the Commissioner and not decided below". The long established nature

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(Continued from preceding page)

Clark v. United States, 13 F.R.D. 342 (D. Ore. 1952);
Fowler v. Crown-Zellerbach Corporation, 163 F. 2d 773 (9th Cir. 1947);
Daitz Flying Corp. v. United States, 4 F.R.D. 372 (E.D. N.Y. 1945);
United States v. Fallbrook Public Utility District, 165 F. Supp. 806 (S.D. Cal. 1958);
United States v. E. I. DuPont de Nemours and Co., 10 F.R.D. 618 (D. Del. 1950);
United States v. Shubert, 15 F.R. Serv. 33.333, Case 1 (S.D. N.Y. 1951);
United States v. E. I. DuPont de Nemours & Co., 11 F.R.D. 308 (D. Del. 1951).

of this limitation is attested by a like ruling as far back as *Ewing v. Howard,* 7 Wall. 499 (1869), where it was held that the defense of usury could not be raised in the Supreme Court for the first time. See also *Virtue v. Creamery Package Mfg. Co.,* 227 U. S. 8 (1913) and *Virginian Rwy. Co. v. Mullens,* 271 U.S. 220 at 227 (1926), where this Court emphasized the importance of joinder of issue as a factor against considering a new theory for the first time on appeal.

This Court has shown concern about prejudice to the party who tried the case on one theory in the court below and suddenly found himself facing for the first time on appeal another theory introduced by the Government. In *Giordenello v. United States,* 357 U. S. 480 (1958), the Government originally argued in the court below that the arrest was justified because the warrant was valid. Before the Supreme Court the Government argued that even if the warrant was invalid, the arrest itself was valid because based on probable cause that a crime had been committed. The Court at page 488 stated:

> "We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory in the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond".

In *Giordenello* the Court further pointed out that the petitioner might otherwise have pursued a different line of cross-examination.

Cf. *Peck v. Heurich,* 167 U. S. 624 at 629 (1897), where this Court observed that "A judgment cannot be affirmed upon a ground not taken at the trial, *unless it is made clear beyond doubt that this could not prejudice the rights*

of the plaintiff in error". (Emphasis added.) The instant case is clearly not one where the Government could "beyond doubt" show that appellees herein were not prejudiced by the Government's express waiver below and the resulting joinder of issue in the trial court.

The salutary rule against consideration on appeal of an issue not raised below becomes even more manifestly sound where, as in this case, the Government expressly waived the issue below.

In *Helvering v. Wood,* 309 U. S. 344 (1940), the Government for the first time on appeal argued that a certain section of the Revenue Act sustained the tax in question. The Court said at 349:

> "For a wholly different reason, petitioner's argument based on Section 22 (a) must fail. The Board of Tax Appeals purported to place its decision solely on Section 166 and 167 of the Act. Petitioner in his assignments of error mentioned specifically only Sections 166 and 167, not Section 22 (a). In his brief before the Circuit Court of Appeals petitioner expressly waived *reliance* upon any section other than Section 166 * * *. In view of these facts, *especially the express waiver below,* we do not think that petitioner should be allowed to add here for the first time another string to his bow. * * * To open here for the first time *and in the face of the express disclaimer* an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but *to permit a shift to ground which the taxpayer had every reason to believe was abandoned* * * *" (Emphasis added.)

In distinguishing *Helvering v. Wood, supra,* and finding special circumstances warranting consideration on appeal of an issue not raised below, Justice Black, speaking for the Court in *Hormel v. Helvering,* 312 U. S. 552 stated at 557 (1941):

> "* * * We held in *Helvering v. Wood*, 309 U.S. 344, 348-349, that the Government could not present in this Court as a wholly new issue the applicability of Section 22 (a). But we there especially relied upon the fact that the Government, when the case was before the Circuit Court of Appeals *had made an express waiver* of any reliance on 22 (a)." (Emphasis added.)

The necessity of defining and limiting issues has special relevance to antitrust cases where avoidance of undue protraction of trial has brought about customary resort to pre-trial discovery, to pre-trial conferences and pre-trial orders designed to identify and narrow the issues. Indeed, the Government's specific disclaimer of intention to seek an overruling of *General Electric* and its express acknowledgment that the case was "still good law" were avowedly for the purpose of apprising appellees of the Government's basic theory of its case and thus "to aid them in preparation for trial" (Pre-Trial Order, J. S. 34a). Despite these matters of record, the Government would negate the very objectives of orderly pre-trial by changing horses on appeal to ride toward the goal of persuading this Court to overrule *General Electric*.

In this connection, it is sheer sophistry for the Government to argue that appellees were not prejudiced since on grant of their motion to dismiss made at the conclusion of the Government's case, appellees "have not yet had occasion to adduce evidence in support of their defenses". (J. S. Footnote 10 at p. 11.) It is inherently prejudicial to any party to prepare for and conduct a trial on one issue and then have the issue changed on appeal. The Government statement ignores the fact that the criminal trial and the stipulation that the Government could offer in this civil suit the record of its evidence in the criminal proceeding

both occurred *after the Government had disclaimed any intention to attack the validity of General Electric.* It cannot be presumed that the Government's witnesses would have been cross-examined in the same manner in the absence of the waiver or that the record of the criminal case would have been stipulated at all in that event.

The Government's concession that in this case it is only seeking prospective injunctive relief against further enforcement of the restrictions in the Huck-Townsend license does not eliminate the serious prejudicial effects upon appelles if *General Electric* should be overruled. Both Huck and Townsend would be exposed to liability in treble damage suits.

While Lower Courts Generally Follow Supreme Court Decisions, The Government Could have Challenged General Electric As Allegedly No Longer A Vital Precedent

The Government seeks to convince this Court that the pre-trial statements on behalf of the Government of record in this case, when viewed in the light of the circumstances in which they were made, "merely expressed the obvious point that the government could not properly have urged the district court not to follow General Electric let alone to 'overrule' it". The Government then cites various cases in the lower federal courts in support of its generalization that " * * * until this court has spoken its outstanding decisions are undeniably binding upon the lower courts". (J. S. 11, Footnote 10.)

Appellee recognizes that district courts generally and properly must as a matter of law feel obligated to follow and apply the decisions of the Supreme Court or of a

Court of Appeals in the same district if the particular question has not yet been adjudicated by the Supreme Court. But when the Government intends to ask this Court to overrule one of its earlier decisions and the defendants ask prior to trial what the position of the Government is with respect to the doctrine announced in the earlier decision, the Government must set forth its position and its intentions so that the defendant can properly prepare for trial and the trial court can determine what evidence is admissible. Otherwise this Court's whole concept of pre-trial procedures for limiting and defining issues is violated.

Moreover, it is an over-generalization for the Government to assert the automatic assumption that a lower court will *invariably* feel obliged to follow a Supreme Court decision. In the instant case, this automatic assumption is especially questionable in view of the Government's flat statement that "*General Electric* has long ceased to be a vital precedent". (J. S. 17.) If the Government really believes that *United States v. Line Material*, 333 U. S. 287 (1948), served notice "that General Electric was no longer a reliable precedent", then by its own assertion it is admitting that there was no excuse for not raising that issue in the court below.

II.

THE GENERAL ELECTRIC DECISION SHOULD NOT BE OVERRULED, EVEN APART FROM THE GOVERNMENT'S WAIVER OF THAT ISSUE BELOW

Appellees strenuously dispute the Government's position that "General Electric rested upon an erroneous view of the nature of the patent monopoly"; that "General Electric has long since ceased to be a vital precedent"; that it is "out of harmony with other decisions of this Court"; and that it has been a prolific source of confusion and uncertainty". (J. S. 17-18.)

To understand the unsoundness of the Government position it is necessary to consider the background of the *ratio decidendi* of *General Electric*, which for the past thirty-eight years has remained "good law", as the Government expressly stated below, despite repeated unsuccessful efforts of the Government in the 1940's to persuade this Court to repudiate it.

The Patent Laws and The Antitrust Laws Are Construed By This Court in Pari Materia and The Antitrust Laws are Accordingly Modified Pro Tanto

The latest expression of this Court on this subject is in *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964), where Justice Douglas speaking for the Court, placed *General Electric* in perspective in these comments:

> "The Court in that case particularly relied on the fact that patent rights have long included licenses 'to make, use, and vend' the patented article 'for any royalty, or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' *Id.*, 272 U.S. at 489, 47 S. Ct. at 196, 71

L. Ed. 362. Congress in establishing the patent system included 35 U.S.C. Sec. 154, which provides in part 'Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right *to exclude others from making, using, or selling* the invention throughout the United States, referring to the specifications for the particulars thereof.' (Italics added by Court).

"'The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.' *Adams v. Burke,* 17 Wall. 453, 456, 21 L. Ed. 700. Long prior to the General Electric case, price fixing in the marketing of patented articles had been condoned (*Bemet & Sons v. National Harrow Co.,* 186 U.S. 70, 22 S. Ct. 747, 46 L. Ed. 1058), provided it did not extend to sales by purchasers of the patented articles. *Adams v. Burke, supra; Ethyl Gasoline Corp. v. United States,* 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852.

"The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto.* That was the *ratio decidendi* of the General Electric case. See 272 U.S., at 485, 47 S. Ct. 192, 71 L. Ed. 362. We decline the invitation to extend it."

Appellees submit that this aptly sums up the Congressional intention in the accommodation of the patent laws to the antitrust laws in harmony with the Constitutional purpose of promoting the progress of science and the useful arts. The patent laws and the antitrust laws are not inherently in opposition. On the contrary, both sets of laws stem from the paramount public policy of maintaining a healthy competitive economy. Within its appointed orbit,

each of these bodies of law reveals the Congressional design of fostering purposes compatible with private competitive enterprise.

Thus, in reconciling the overriding public interest in promoting progress of science and the useful arts with the private incentive to invent and to invest risk capital in patented inventions, Congress also sought to effectuate the Constitutional purpose of "securing for limited Times * * * to Inventors the exclusive right to their * * * Discoveries". Constitution, Article I, Section 8. This reward to inventors has been characterized as secondary to the primary purpose of promoting technological progress. It could be characterized in a more meaningful sense as the instrument by which the primary purpose is effected, because anything which weakens the incentive provided by the patent system renders it less effective for its primary purpose. Thus, unless the patent laws are construed *in pari materia* with the antitrust laws, the essence of the patent grant as a right to exclude all others from making, using, or selling the patented invention would be rendered nugatory since the legitimate reward of the patentee would then be branded as an antitrust violation.

The *General Electric ratio decidendi,* formulated by a unanimous Supreme Court in an opinion by Chief Justice Taft, constitutes a sound harmonization of these two sets of laws. In *General Electric* the Court announced as the yardstick for measuring the lawful rights of the patentee, when he acts individually and stays within the scope of the claims of his patented invention, the following fundamental proposition:

> "* * * the patentee may grant a license to make, use, and vend articles under the specifications of his patent for any royalty, or upon any condition

> the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure". (272 U.S. 476, 489.)

This Case is Factually Like General Electric

The court below concluded that Huck did not secure a reward beyond that to which it was legally entitled as the patent owner within the *ratio decidendi* of General Electric. In so concluding, it correctly found that on its facts, the case at bar is essentially like the General Electric case. The General Electric case was like the instant case in the following material respects:

(a) There was only one patent license with a first sale price limitation. In *General Electric*, while the license to Westinghouse was nonexclusive, it was the only one granted by General Electric with a first sale price limitation. In this case the Huck license to Townsend was exclusive but it is also the only license granted by Huck with a first sale price restriction.[5]

(b) In both *General Electric* and this case the patentee reserved its right to make and sell the licensed patented article concurrently with the licensee with whom it competed. This factor is precisely the ground upon which the Court sanctioned the first sale price restriction. Chief Justice Taft said:

> "One of the valuable elements of the exclusive right of a patentee is to acquire profit at the price at which the article is sold. The higher the price, the

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[5] Also in *Bement v. National Harrow Co.*, 186 U.S. 70 (1902), only a single license was before the Court. The Court was not called upon to decide more than whether a first sale price limitation in that license was valid.

> greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend *and retains* the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making and selling them myself' • • •". (Emphasis supplied.)

(c) Most importantly, it should be noted that neither *General Electric* nor this case involves a plurality of licenses with a first sale price restriction.[6]

In this case the appellees do not have any occasion to seek an extension of *General Electric* for the obvious reason that the facts in this case are precisely within the bounds of *General Electric.*

The Scope of General Electric Has Been Clearly Defined

General Electric in the 1940's was a subject of controversy not only regarding its soundness but, more significantly, because at that time the scope of the permissible limits of the *General Electric* rule needed clarification. Subsequent cases clearly define its boundaries.

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[6] This was held improper in *Newburg Moire Co. v. Superior Moire Co.*, 237 F. (2d) 283-284. A factor in this *Newburg* case was the dominance of the market by the patentee and its several licensees. In the instant case the court found (Finding 9 J. S. 10a) that there are other fasteners used and usable for the same purpose as lockbolts and there is no finding that Huck and Townsend dominate the relevant market.

United States v. Line Material Co., 333 U. S. 287 (1948), was one such case. There the Government sought to have this Court overrule *General Electric* but an equally divided Court declined to do so.

In *Line Material*, however, the cross-license between Line and Southern, each of which owned separate but complementary patents, was held in violation of Section 1 of the Sherman Act because, as stated by Justice Reed at p. 311:

> "While the General Electric case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-license or other arrangements to fix the prices to be charged by them and their licensees for their respective products. * * *"

In this case there is no combination of separately owned Huck and separately owned Townsend patents. The Huck-Townsend patent license here in issue covers *only* patents owned by Huck which the Government conceded are *valid* patents. Furthermore, in this case, there are no *plural* patent licenses granted by Huck with a first sale price restriction. In *Line Material* Justice Reed carefully distinguished *General Electric* on its precise facts. Assuming the the validity of the *General Electric* case, he stated that in a single, vertical patent license with a first sale price restriction, "that reasonable restraint accords with the patent monopoly granted by the patent law."

Since *Line Material* this Court has itself demonstrated that the fear that *General Electric* would present "a host of difficult and unsettled questions", as the Government argued in its *Line Material* brief, or "has become a prolific

source of confusion and uncertainty", as the Government now argues, has not been borne out. The course of decisions of this Court in patent-antitrust cases subsequent to *Line Material* and cases in the lower federal courts applying the guides set down by this Court show that courts have had no difficulty distinguishing legitimate arrangements under *General Electric* from conspiracy cases.

By its own presentation and citation of cases the Government has reduced to insignificance its main argument that "* * * *General Electric* is out of harmony with other decisions of this Court which consistently have invalidated restrictive conditions in patent-licensing agreements". (J. S. 18.)

The inherent contradiction in this generalization is easily revealed. *General Electric* has been kept within its constricted bounds precisely because this Court has invalidated retrictive conditions in patent licenses beyond the ambit of General Electric. What the Government is really doing is attempting to rekindle into a flame the embers of a burning issue in the 1940's which this Court itself has relegated to the limbo of the past.

General Electric Is In Complete Harmony With Subsequent Decisions of This Court in Patent Misuse and Antitrust Cases

A summary of the series of decisions of this Court, relied upon by the Government in again urging this Court to repudiate *General Electric* will demonstrate that all of these decisions are consistent and in harmony with *General Electric* when properly construed.

First, appellee thinks it is clear that the patent misuse cases cited by the Government are not in "'a closely related context", as the Government states (J. S. 12), but in an

entirely different context. Since *Motion Picture Patent Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917), this Court has consistently struck down restrictions in patent licenses which had the effect of using a patent to restrain trade in articles not within its scope. These patent misuse cases are irrelevant because neither this case nor the *General Electric* case involve any restraints on trade in unpatented articles.

The Government is also in error in citing a group of patent-antitrust cases[7] as being in support of its generalization that *General Electric* is inharmonious with other decisions of this Court and "a prolific source of confusion and uncertainty".

Appellees have already shown that *Line Material* involved a combination of the separately owned patent rights of two patent owners plus a horizontal price fixing conspiracy between the patentees and their sublicensees, as well as among the sublicensees themselves. This combination and conspiracy is obviously outside the lawful pale of *General Electric.*

In the *Ethyl* case and in the *Univis Lens* case, both *infra,* resale price maintenance was struck down, consistent with *Simpson, supra,* but neither impairs the right of a patentee to control the price of the first sale, which is within the patent monopoly.

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[7] *United States v. Line Material Co.*, 333 U.S. 287; *United States v. United States Gypsum Co.*, 333 U.S. 364; *United States v. Masonite Corp.* 316 U.S. 265; *United States v. United States Gypsum Co.*, 340 U.S. 76; *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828 (D. Del.) cf. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20. See, also, *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (price control over one patented product used as a lever to control others). See also: *United States v. Univis Lens*, 316 U.S. 241 is also distinguishable.

The *Masonite* case, *supra,* was one of the horizontal price fixing, quite different from the single vertical patent license sanctioned in *General Electric.*

The two *Gypsum* cases, *supra,* and *United States v. New Wrinkle,* 342 U.S. 371 (1952) were industry-wide licensing and horizontal price fixing arrangements, far different than the single vertical patent license of *General Electric.*

The district court concluded that cases such as those summarized above are distinguishable from *General Electric* and that the instant case is in all material respects within the limited exception of *General Electric.* (Conclusion VII, J. S. 28a-29a.)

This Case Does Not Contain Any of the Factors Normally Present When This Court Overrules Its Prior Decisions

The wisdom of not overruling the *General Electric* case is supported by a review of the history of this Court in overruling decisions since its founding.

The basic factors which have motivated this Court to overrule its prior decisions seem generally to have been one or more of the following three: (1) inconsistent later cases, (2) the lessons of experience and (3) changing conditions.[8] None of the above basic factors is present in this case.

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[8] See Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 Mich. L. Rev. 151 (1958) (table of such cases listed in Appendix to this article); Israel, Gideon v. Wainright: the "Art" of Overruling, The Supreme Court Review 211 (1963) (supplementing the table in Blaustein & Field, supra).

As has been shown above, *General Electric* is not "out of harmony" with other decisions of this Court and, therefore, one of the basic grounds upon which this Court has been disposed to reconsider and overrule a prior precedent —that the prior precedent is in conflict with or inconsistent with the later precedents—is lacking. By its own presentation the Government has demonstrated that this Court has been astute in striking down every genuine patent misuse and antitrust abuse of patents when, on the facts, the conduct of the defendants strayed from the orbit of the *General Electric* case. The later precedents of this Court are entirely consistent with the *General Electric* case, since they struck down only licenses which extended the scope of the rule.

Since *Line Material,* the decisions of this Court have demonstrated its judicial perceptiveness in striking down as patent misuse or antitrust violation, or both, departures from the legally permissible limits of *General Electric.* There is, therefore, no basis, from this judicial history, for the Government's protestation that its experience with the operation of the *General Electric* rule since Line Material "has further convinced us of the unsoundness of that decision." (J. S. 10.) There is nothing here to indicate the nature or validity of the Government's "experience" to which it refers.

There is likewise no evidence of any changing conditions which would prompt the overruling of the *General Electric* doctrine. There is no evidence comparing the conditions of 1926 with the conditions of 1963, when this case was tried. In fact, as pointed out hereinafter, any change has been in favor of continuing the rule, since for thirty-eight years reliance has been placed upon it.

The General Electric Decision Has Been Justifiably Relied Upon By Businesses

The fact that a decision of this Court has been relied upon in business transactions for many years may be taken into consideration in weighing the propriety of overruling that earlier decision. The *General Electric* decision has withstood all attacks for about thirty-eight years. While in many cases, this Court and lower courts have refused to extend its scope, it has never been overruled and still remains the law of the land.

It is suggested by the Government that the *General Electric* decision should no have been relied upon in business transactions after the *Line Material* decision, in which an equally divided Court refused to overrule it. (J. S. 17.) It must be remembered, however, that the decision was *not* overruled. Businessmen are entitled to and have relied on the cases of this Court which have not been overruled. Furthermore, since *Line Material* the decision in *General Electric* has been followed by a number of lower courts in upholding licensing arrangements.[9] The very existence of these cases in the lower courts gives some indication of the number of businessmen who have relied on the *General Electric* doctrine since the *Line Material* case in 1948.

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[9] *Prestole Corporation v. Tinnerman Prod.*, 271 F. 2d 146 (6th Cir. 1959); *Westinghouse Electric Corp. v. Bulldog Eectric Products Co.*, 179 F. 2d 139 (4th Cir. 1950); *Glen Raven Knitting Mills v. Swanson Hosiery Mills*, 189 F. 2d 845 (4th Cir. 1951); *Sunbeam Corp. v. Wentling*, 192 F. 2d 7 (3rd Cir. 1951); *Columbia Pictures Corp. v. Coomer*, 99 F. Supp. 481 (E. D. Ky. 1951); *Ronson Patents Corp. v. Sparklet Devices Inc., et al.*, 112 F. Supp. 676 (E. D. Mo. 1953).

The Government's Economic Analysis of the Alleged Effects Of General Electric is Devoid of Empirical Evidence, Being Based on Mere A Priori Assumptions

Appellee next submits that the Government, having failed to show that *General Electric* runs counter to Constitutional purposes or the enacted Congressional patent laws, by condoning either patent misuse or antitrust violation, shifts to *a priori* assumptions in questioning that the first sale price limitation in a patent license should be a part of the reward to which the patentee is entitled, as held in *General Electric.* No empirical evidence is adduced by the Government in support of the abstract and hypothetical situations it discusses at pages 14-16 of its Statement.

Among the questions that call for empirical data are the following: Is there a large or small volume of commerce involved in patent licenses containing a first sale price limitation in a single license? Is the first sale price so fixed any greater than that which would result from a high royalty rate if it were not coupled with a first sale price restriction? To what extent would a patentee be disposed to refrain from licensing even one other competitor if he wished also to make and sell the licensed patented article? Is the first sale price limitation in a single patent license designed merely to protect the competing patentee against destructive price cutting in the sale of the patented device by his single licensed competitor rather than designed to forestall competition generally? Would the overruling of *General Electric* result in resort to trade secret protection on a larger scale than is now the case?

The Government points to alternatives from which a patentee may elect to gain profit other than through a first sale price limitation in a patent license, but none of these alternatives is, in the view of appellees, in the public interest.

Certainly the public interest is not advanced by forcing the patentee to sell or to assign his patent. (J. S. 14.) The purchaser as sole producer could still set his own price. Furthermore it is purely hypothetical and speculative to say that a patent can be marketed in the above way as readily as by a license to one other party with a first sale price limitation. There may be no interested prospective purchaser or assignee and a license may be the only practical alternative.

Next, the Government states that the patent owner "may refrain from licensing and reap his reward in the form of manufacturing profits." (J. S. 14.) This abstract proposition is plainly a mere assumption that the public interest would be advanced by compelling the patentee to be the sole manufacturer of the patented article. The probabilities are that public interest would be advanced by inducing a patentee to create a needed second manufacturing source of the patented article, when the patentee prefers to license another for that purpose. Huck did precisely that in this case.

Equally untenable is the Government's argument to the effect that public interest would be advanced by restricting a patentee, who elects to license a competitive producer, to the patentee's right to exact from the competitor a royalty as high as he is willing to pay. It is an unsupported and unsupportable assumption that the public might benefit from the superior efficiency of a competitor of the patentee

in overcoming the burden of a high royalty rate to sell his output at a lower price than the one that patentee might set. It is more probable that the licensee could not undersell the licensor because he could not absorb the high royalty.

It is evident that the broad policy questions pertaining to a reconsideration of General Electric cannot be resolved on mere theoretical reasoning advanced by the Government. At stake are not only the private interests of parties such as Huck and Townsend, but more importantly the public interest in maintaining the minimum of exclusive rights of patentees, involving as they do both the preservation of incentive to invent and high risk capital investment incentives for costly research and development.

Whether General Electric Should Stand as a Precedent or Be Rejected is For Congress To Determine

This brings appellee to the point that, even though *General Electric* may be regarded as a judicial interpretation, carving out an exception to the antitrust laws, it is today a doctrine that should be changed only if the Congress so elects. Numerous bills were introduced in Congress during the 1940's proposing to outlaw patent license restrictions of the type sanctioned by *General Electric*.[10] None of them was acted upon.

Moreover, in 1952, when Congress enacted the Patent Code, 35 U.S.C., it did not enact any prohibition against patent licenses containing restrictions such as are sanc-

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[10] S. 2730, 77th Cong., 2d Sess. (1942); S. 2491, 77th Cong., 2d Sess. (1942); H.R. 7713, 77th Cong., 2d Sess. (1942); H.R. 109 78th Cong., 1st Sess. (1943); H.R. 1371, 78th Cong., 1st Sess. (1943); H.R. 3874, 78th Cong., 1st Sess. (1943); H.R. 97, 79th Cong., 1st Sess. (1945); H.R. 3462, 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947).

tioned by General Electric. To the contrary, the legislative history of the Patent Code shows that the prime intention of Congress was to strengthen, rather than to weaken patent rights.[11]

Overruling General Electric Would Open The Floodgates to Outlawing Other Valid Restrictions In Patent Licenses

The Government's focus upon the first sale price restriction validated by *General Electric* overlooks the far-reaching other consequences which would flow from overruling *General Electric*. The *ratio decidendi* of that case comprehends more than a first sale price restriction in a patent license. The reasonable reward was interpreted by this Court in *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124 (1938), to sanction also a field of use restriction. In his majority opinion of the Court, Justice Brandeis specifically stated that this use restriction is of the character sanctioned by *General Electric*, from which he quoted with approval. He also stated at p. 127, "That a restrictive license is legal seems clear", citing this Court's early case of *Mitchell v. Hawley*, 16 Wall. 544 (1872) and that "The practice of granting licenses for a restricted use is an old one", citing *Rubber Co. v. Goodyear*, 9 Wall. 778. There would appear to be no rational basis for distinguishing a first sale price restriction from other common patent license restrictions such as restrictions as to territories, quantities, fields of use or types of products.

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[11] See Hearings on Patent Law Codification and Revision before Subcommittee No. 3, Serial No. 9, House Committee on the Judiciary, 82nd Cong., 1st Sess. (1951).

In this case the Government is attacking only the first sale price patent license limitation sanctioned by *General Electric*. It is not necessary in this case to inject a discussion of the other patent license restrictions mentioned above except to point out that once *General Electric* is reconsidered on the first sale price aspect of a patent license, the Court is inviting a Government attempt to have invalidated the other types of license limitations long held valid and within the ambit of *General Electric*.

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE HUCK-TOWNSEND PATENT LICENSE ARRANGEMENT IS IN ALL MATERIAL RESPECTS WITHIN THE SANCTION OF GENERAL ELECTRIC

The district court's conclusion was that upon the evidence "the case at bar is in all material aspects the same as and rule by the decision in *U. S. v. General Electric Co.* * * *" and that the Government "failed to show that the patent arrangements between Huck and Townsend were designed to or did secure a reward beyond that to which Huck as the patent owner was legally entitled". (Conclusions VII and IX, J. S. pp. 28a, 29a.)

This conclusion of the district court is challenged by the Government in the Jurisdictional Statement almost as an afterthought to its effort to have the *General Electric* doctrine overruled. The Government's alternative argument is that the price maintenance agreement was in return for the right in the licensee to restrain the patentee from issuing further licenses. However, the Government's statement of this issue makes it quite clear that the effect of the asserted agreement between Huck and Townsend is no different than would be the granting of an exclusive li-

cense to Townsend for the life of the patents. The grant of an exclusive license in itself restrains the patentee from granting further licenses under his patents.

The district court correctly concluded (Conclusion I, J. S. 25a) that an exclusive license in no way violates the Sherman Act. Neither this Court nor any lower federal court has ever held to the contrary. What the Government overlooks is that inherent in the grant of an exclusive license to one person, or to that person except for the patentee himself, is an undertaking by the patentee not to license others so long as the exclusive license is in force.

If it be accepted that a patentee may grant an exclusive license reserving the right to compete with its licensee, and it further be accepted that the *General Electric* doctrine as to first sale price maintenance is sound where the license is non-exclusive, is there any basis for holding that an exclusive license may not contain a first sale price maintenance provision where the patentee reserves the right to sell the patented devices? What are the adverse consequences of such an agreement? Insofar as it may be said to involve a restraint against the grant of another license it is no different than any exclusive license. Moreover that restraint, if it be one, has no different consequences in an exclusive agreement containing a price maintenance clause than in a case like *General Electric* where there was only one non-exclusive license containing a price maintenance clause. Actually, in the light of the cases holding multiple non-exclusive price maintenance licenses to be objectionable, a price maintenance license which is exclusive serves to insure against the evil of multiple licenses of the same type.

What the Government confuses is a situation, such as is here presented, where an exclusive patent license inher-

ently and by its very nature obligates the patentee during the existence of the exclusive license not to license others, and a situation where the patentee delegates to another the power to veto the granting of other licenses by the patentee.

Besser Manufacturing Co. v. United States, 96 F. Supp. 304 (E. D. Mich. 1951), affirmed, 344 U.S. 444 (1952), is clearly not apposite to this case. In *Besser* the Government did not dispute the validity of the exclusive license as such. It challenged a provision in a license whereby the two independent individual patentees covenanted that they would not grant any other license under their patents without joint *written consent of Besser and Sterns*, the joint exclusive licensees. This gave Besser and Stearns a veto power over the grant by the patentees of a license to any other party. In such circumstances, it is understandable that the district court in *Besser*, while recognizing that an exclusive license as such would be lawful, held that a *horizontal* agreement or combination between the two patentees and the two exclusive licensees, Besser and Stearns, that no further licenses would be granted without the consent of the licensees was beyond the protection of the patent grant and violated the Sherman Act. It is also to be noted that in *Besser* the entire relevant industry was completely dominated by the two exclusive licensees.

In contrast the patentee in the instant case, Huck, acting independently in the sole exercise of its own discretion, granted Townsend an exclusive license, at first for two years and then, if the Looker testimony is to be accepted, extended the exclusive license for the life of the relevant Huck patents. There was no provision for agreement on other licensees, but simply an inherent incapacity of Huck to grant any other licenses.

United States v. Krasnow, 143 F. Supp. 184, affirmed 355 U.S. 5, is another case involving collaboration of licensor and licensee in the selection of other licensees. Moreover, it involved a flagrant attempt to create a monopoly based on questionable patents which were used for harassing purposes but never put to the final test of litigation. This contrasts with the present case, in which there is no provision for agreement on other licensees, and the validity of the basic Huck patents covered by the license, is conceded, having been litigated and held valid in a fully contested infringement action. (Finding 12, J. S. 10a.)

In sum, without attacking the findings of fact of the court below on this phase, the Government apparently argues that an exclusive license with a first sale price limitation is *per se* beyond the scope of *General Electric*. If, as seems clear *General Electric* sanctions a first sale price limitation in a purely vertical patent license arrangement between the parties thereto, the "minimal scope" of *General Electric* clearly must sanction such a price limitation where, as in this case, there is only a single and exclusive license with such a first sale price restriction. In *General Electric*, while the General Electric license to Westinghouse was actually non-exclusive, that license was the only one which contained a first sale price limitation. In both cases the patentee reserved the right to compete with the single licensee and hence needed the price limitation to protect his due reward as patentee.

CONCLUSION

As to the first question presented by the Government this is not a proper case for reconsidering *General Electric* for the purpose of determining whether or not it should be overruled. To hold otherwise would be to permit a

complete reversal of position by the Government, to the prejudice of appellees, in a situation where there are no extenuating factors. Moreover, we submit that the rule that the Government objects to, is indeed sound, and that any change therein at this date is for the Congress.

The second question presented by the Government is not significantly different from the first; the decision of the district court on that question is clearly correct.

This appeal therefore presents no questions of substance or which warrant briefs and oral argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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October 26, 1964.

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, *Plaintiff*, v. HUCK MANUFACTURING COMPANY, AND TOWNSEND COMPANY, *Defendants.*	Civil No. 21-791

STIPULATION

It is hereby stipulated among all parties to this action by their attorneys as follows:

The entire Record in the case of *United States v. Huck Manufacturing Company, et al.*, (Criminal Action #39017, E. D. Mich.) is to be placed in evidence in this action subject to all objections appearing therein. Such Record shall constitute the plaintiff's case-in-chief in this action and on which plaintiff will rest. Defendants will move by April 15, 1963 pursuant to the Federal Rules of Civil Procedure for a dismissal of this action on that Record.

Jack L. Lipson	Arthur W. Dickey Harness, Dickey & Pierce	T. W. Pomeroy, Jr.
Charles E. Esherick	Albert M. Stern Stern and Rossier by permission AWD	Kirkpatrick, Pomeroy, Lockhart & Johnson
Attorneys, United States	Attorneys, Huck Manufacturing Company	Attorneys, Townsend Company
Date March 20, 1963	Date April 1, 1963	Date March 21, 1963